

## APPEAL NO. 010469

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 8, 2001. With regard to the issues before him, the hearing officer determined the appropriate reduction (contribution) of impairment income benefits and supplemental income benefits (SIBs) to be 12/16 (75%) of the income benefits (reduced from a Texas Workers' Compensation Commission (Commission) determination of 14/16 (88%)); that the respondent (claimant) was not entitled to SIBs for the fourth quarter; and that the appellant (carrier) is to reimburse the claimant for excess contribution that has been withheld since June 2, 1999.

The carrier appealed the contribution issue and the reimbursement finding on both legal and factual grounds and appealed the nonentitlement to SIBs on the basis that it requests that we reverse the hearing officer's finding on direct result. The file contains neither a response nor an appeal from the claimant.

### DECISION

Affirmed in part and reversed and rendered in part.

The claimant sustained a compensable low back injury in \_\_\_\_\_; had spinal surgeries at the L4-5 and L5-S1 levels in 1992 and 1993; and removal of hardware in 1994. Dr. B, the designated doctor for the 1991 injury, assessed a 20% impairment rating (IR). The hearing officer's Statement of the Evidence contains a detailed analysis of Dr. B's assessment. The claimant returned to work and had another compensable injury on \_\_\_\_\_, when he was hit by a forklift. The claimant sustained injuries to his low back and right shoulder in the 1997 injury and had spinal surgery at the L5-S1 level in the form of a laminectomy, nerve root decompression and fusion with hardware on March 10, 1998. The claimant reached statutory maximum medical improvement (MMI) (see Section 401.011(30)(B)) in May 1999. Dr. LB was appointed as the designated doctor for the 1997 injury. In a Report of Medical Evaluation (TWCC-69) and narrative, both dated May 13, 1999, Dr. LB certified MMI on March 10, 1999, with a 16% IR. Basically, Dr. LB assessed the 16% IR from various components of Table 49, Section II of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides), including "1% from line G2 with an additional 1% for the second level from the most recent lumbar procedure (3/10/98)." Range of motion (ROM) was invalidated and rated at zero percent impairment and a zero percent impairment was assessed for "neurological compromise." The shoulder injury was considered and rated at zero percent impairment.

The hearing officer commented on Dr. LB's assessment, stating:

Oddly enough, and with no explanation why, [Dr. LB's] ratings from Table 49 of the [AMA Guides] for the surgeries were for the three surgeries for the

previous low back injury in 1991. In his narrative, he *specifically* named the dates of the surgeries in 1992, 1993, and 1994. But, he did not mention nor rate the 1998 surgery for the current low back injury. This gross error has apparently not been disputed. Since the doctor rated all of the 16% IR based on the 1991 injury and 1992-94 surgeries, he was actually rating the 1991 injury all over again. The doctor found no sensory deficit or motor loss. Also the Claimant had completely invalidated all of his ROM measurements with [Dr. LB].

The hearing officer did a detailed analysis of Dr. B's report vis-a-vis Dr. LB's report to calculate how he arrived at the 12/16 (75%) contribution rate. The hearing officer then made the following factual findings:

### FINDINGS OF FACT

6. In May 1999, the Commission-designated doctor assigned an [IR] of 16% from Table 49 of the [AMA Guides] for the Claimant's 1991 compensable low back injury and resulting three surgeries. The doctor did not rate the 1998 surgery that the Claimant underwent for his 1997 compensable low back injury.
7. Of the 16% [IR] rendered in May 1999, only 12% was duplicative of the February 1994 rating for the 1991 compensable low back injury. The other 4% of the May 1999 [IR] was not rated in the February 1994 [IR], nor duplicative of any part of the 1994 [IR].

The hearing officer is factually incorrect in his determination that Dr. LB had not considered the 1997 injury and the 1998 surgery. In addition to the previously quoted portion of Dr. LB's report, where she assessed an extra two percent specifically for the March 10, 1998, surgery, Dr. LB, on page 3 of her report, specifically discusses the "3/10/98" surgery, describing it as "a L5/S1 Laminectomy with discectomy, bilateral hemi-laminectomy of L4 with nerve root decompression, with BAK cages and fusion at L5/S1." In addition, at the beginning of her May 13, 1999, narrative, in bold type, Dr. LB writes:

**The claimant receives a total of 16% Whole Person Impairment. Please note that of the entire impairment, 14/16ths are related to surgical intervention that occurred prior to the date of injury in question and 2/16ths are related to surgical intervention after the [ \_\_\_\_\_ ] date of injury. Please see explanation below.**

We find that the hearing officer's recalculation of the contribution was based on a factually erroneous premise; that Dr. LB did not rate the 1998 surgery. Accordingly, we reverse the hearing officer's decision that the appropriate reduction is 12/16 (75%) of the income benefits and we render a new decision that the appropriate reduction (contribution) is 14/16

(88%) as originally determined by the Commission on June 2, 1999, and as opined by Dr. LB. In that we are reversing the hearing officer's decision on the stated basis, we need not address the carrier's argument on "no cumulative impact" and the hearing officer's order that the carrier reimburse the claimant for the excess contribution that it withheld since June 2, 1999 (as there now is no excess contribution withheld). We decline to address the carrier's argument regarding Texas Workers' Compensation Commission Appeal No. 002211-S, decided November 6, 2000, as being moot given our reversal of the hearing officer's decision on the contribution issue.

In regard to the carrier's appeal of the hearing officer's direct result finding on the SIBs issue, we have frequently noted that a direct result determination is sufficiently supported if the record established that the claimant sustained a serious injury with lasting effects such that he cannot reasonably perform the job he was doing at the time of his compensable injury. Texas Workers' Compensation Commission Appeal No. 001847, decided September 15, 2000; Texas Workers' Compensation Commission Appeal No. 001310, decided July 21, 2000; and Texas Workers' Compensation Commission Appeal No. 002982, decided February 12, 2001. We hold that to be the case here and hold the hearing officer's finding to be sufficiently supported by the evidence.

Accordingly, the hearing officer's decision on the direct result finding is affirmed and the hearing officer's decision on the contribution issue is reversed and a new decision rendered that the appropriate reduction (contribution) is 14/16 (88%).

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Susan M. Kelley  
Appeals Judge

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Michael B. McShane  
Appeals Judge